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In The

Supreme Court of the United States

October Term, 1998

WILLIAM J. CLINTON, ET AL.,

Appellants,

v.

MATTHEW J. GLAVIN, ET AL.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

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STATEMENT OF THE CASE

One would scarcely conclude from appellants' brief that for the first time in the Nation's history, the government will deliberately omit tens of millions of persons from its actual count of the population; that, according to the government itself, its statistical methodology will be less accurate than the traditional enumeration and is justified only by a desire to save money; and that a traditional enumeration would count over 98 percent of the population. Perhaps because of the unprecedented and illegitimate nature of this undertaking, the government has candidly acknowledged its preference to shield its plan for the 2000 Census from "lawyers and judges."[1] Appellants maintain that no one has standing to challenge this plan prior to its implementation because it is impossible to foretell who will be injured under the plan. Given that there will be no more information relating to the winners and losers *even after* the plan has been implemented, as the Department of Commerce (the "Department") does not intend to conduct a traditional enumeration against which the results of the plan can be compared, appellants are in truth seeking to erect a permanent barrier against judicial review of their effort to conduct the census.

Under this plan, appellants will conduct only a partial enumeration, and then "statistical[ly] estimate" the remainder of the population in two ways. JA I 170-71.[2] First, the Department will conduct nonresponse follow-up ("NRFU") sampling. JA I 170. Appellants estimate that approximately

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[1] Statement of Director Riche, *Hearing Before the House Subcommittee on National Security*, 104th Cong., 1st Sess. 80 (Oct. 25, 1995).

[2] The Brief of the United States, Joint Appendix, and Jurisdictional Statement Appendix in *Department of Commerce v. House of Representatives*, No. 98-404, will be referred to as "Br. I," "JA I," and "*House* JS App.," respectively. The Brief of the United States and Joint Appendix in this case will be referred to as "Br. II" and "JA II," respectively.

33% of the people who receive census questionnaires, primarily through the mail, will not respond. JA I 88. In the past, the Department attempted to find every person that has not responded to the mail-out through an intense process of nonresponse follow-up. JA I 49-50. This essential component of the headcount will be abandoned under the Department's plan for the 2000 census.

The Department will instead select at random only the number of households that need to be counted in order to enumerate 90% of the addressees in a census tract to whom questionnaires were mailed. JA I 88, 170, 363. Thus, in a census tract where 70 percent of addressees return their forms by mail, the Department will randomly select 2 out of every 3 nonresponding households for follow-up. JA I 91. Given that the Department has consistently maintained that 90% of the population will be physically counted under its plan, the Department's plan is necessarily predicated on the fact that each person who is selected for nonresponse follow-up will ultimately be physically identified and counted.[3] After the 90% enumeration has been reached in each tract, the Department will then add to its actual population count an estimate of the number of people in the 10% of households that were not selected for nonresponse follow-up. JA I 92. Thus, the Department intends to add approximately 26 or 27 million people from 12 million households to the results of the traditional headcount. JA I 100. None of these persons will have been physically counted. The Department will simply estimate the number and demographic composition of these unknown persons by imputing to them the population and demographic characteristics of the nearest *nonresponding*

[3] *See, e.g.*, JA I 170 ("The rate at which the sample is selected *will ensure* that at least 90 percent of the housing units in the tract have completed census forms.") (emphasis added); JA I 71 ("The nonresponse follow-up operation in Census 2000 will incorporate the use of sampling to yield a 90 percent completion rate at the census tract level."); JA I 88 ("The Bureau's plan for this operation includes a limited use of statistical sampling to assure that data are collected from at least 90 percent of the housing units in each census tract.").

households in the tract. *Id.* The appellants have never publicly identified any professionally accepted standard supporting this assumption.

It is undisputed that sampling for nonresponse follow-up *decreases accuracy*: "Technically, the *most accurate* design alternative, according to the results of the [Census] *Bureau's* research, would be to attempt 100-percent follow-up of nonrespondents and use ICM [integrated coverage management] to address accuracy problems." General Accounting Office, GAO/GGD-97-142, *Progress Made on Design, but Risks Remain* 26 (July 1997) (emphasis added). By the Department's own reckoning, a complete traditional enumeration and a subsequent ICM adjustment would have an error rate of only .8% at the tract level, which increases to a 1.1% error rate because of the 10% estimate. *Id.* at 79. Appellants do not claim otherwise. They intend to sample the inhabitants of nonresponding households, instead of counting them, solely in order to save time and money, not because it even arguably increases accuracy. JA I 55, 88-89, 99-101. This NRFU sampling thus has nothing to do with correcting any "undercount" or "differential undercount" of the traditional enumeration. Rather, the appellants have deliberately *created* a 10% undercount and then filled the gap by estimating, rather than counting, the people in these identified and occupied households.

Once this initial estimate of the known population has been calculated, the Department will again statistically adjust this population through the use of a process known as "integrated coverage management" ("ICM"). JA I 92-98. ICM is a procedure for statistical estimates generally referred to as dual system estimation ("DSE"), the same methodology utilized in the Post-Enumeration Survey ("PES") conducted after the 1990 census. JA I 94, 98. *See Wisconsin v. City of New York*, 517 U.S. 1, 8-9 (1996). Under the Department's plan, the initial estimate of the population will be followed by a sample survey covering all of the housing units in 25,000 different census blocks. After comparing the differences between the information collected in the initial data collection phase and that collected for the ICM, the Department will assign each person in the ICM sample to a unique "post

stratum, or group of people who" the Department believes have "similar chances (probability) of being counted in the initial data collection operation." JA I 95. "The post strata are defined by a state geographic sub-division (such as rural or urban), owner or renter, age, sex, race, and Hispanic origin." JA I 95-96.

On the basis of the ICM sample, appellants will estimate the number of persons in each post stratum who were correctly counted and will use that estimate to create an adjustment factor for each post stratum. JS 4a-5a. The "adjustment factors" will be applied to each block in the entire country and those adjusted totals will be the reported population number used for congressional apportionment and other purposes. JA I 96-98.[4]

The Department's plan closely mirrors its effort to statistically adjust the results of the actual physical count of the population in the 1990 census. JA I 94, 96, 98. The Department ultimately decided not to make such an adjustment because of the highly questionable assumptions upon which both the PES and the Department's plan were based and the attendant unreliability of the results of this methodology. Indeed, the Department was forced to dramatically revise its initial estimated undercount projection of 2.1 percent to 1.6 percent or approximately ***1 million*** "people." U.S. Dep't of Commerce, Bureau of the Census, *Report of the Committee on Adjustment of Postcensus Estimates* 15 (Aug. 7, 1992).

Appellees are sixteen individuals whose votes will be diluted by the Department's failure to conduct a lawful census in a timely manner and its plan to statistically estimate the population, as well as three counties that will lose federal funding as a result of the Department's plan. JA II 8-13. Appellees filed suit in the Eastern District of Virginia under

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[4] It is expected that the adjustment factor for some post strata will be less than one. Thus, the adjustment based on such post strata may well produce a population figure for a county or city less than the population derived prior to adjustment. Indeed, under 1992 PES adjustment factors, at least 28 large counties would have had their final count reduced *below the number of persons physically counted by the census*. JA II 125-31.

the 1998 Appropriations Act, JS 31a-36a, and challenged the legality and constitutionality of the Department's plan. The three-judge court unanimously held that appellees had standing under Article III because "[t]here are several distinct, concrete injuries that the [appellees] will imminently suffer if the Department's plan is implemented." JS 9a. The court went on to enjoin the plan because it violated Section 195's clear prohibition against using statistical sampling for congressional apportionment. JS 21a.

SUMMARY OF ARGUMENT

1. To place the standing inquiry in its proper perspective, it is important to understand that appellees' injury is fairly traceable to *two* distinct, final decisions made by federal appellants. First, appellants decided not to create, or calculate, the population number derived from the actual enumeration that appellees maintain is legally and constitutionally required, *i.e.*, the number reflecting a counting of 100% of the known population. Rather, they will enumerate only 90% of the known population. Wholly without regard to whether the population number yielded by 100% actual enumeration would produce a "better" relative population for appellees than that provided under appellants' sampling plan, this unconstitutional inaction injures appellees now by making it impossible even to *know*, let alone use, the only lawful census number for apportionment in 2001 or for redistricting in 2002, absent immediate relief. This inaction particularly injures the Georgia appellees because it is *undisputed* that using the lawful census number in 2000 would increase that state's congressional representation beyond that which currently exists. Equally important, the decision not to produce the actual enumeration number forever renders the Department's plan nonjusticiable under the standing barrier appellants seek to erect, since it will not be possible *after* the census is completed for anyone to prove with certainty that they would have had greater congressional representation under the nonexistent actual enumeration number than they were given under appellants' sampling population number.

Second, appellants made a final decision to use a statistical estimate, instead of an actual enumeration, to determine the population for apportionment, redistricting, and federal funding. This plainly injures appellees because it is both substantially likely and undisputed that their share of population for intrastate voting and federal aid will be relatively smaller than if the census population were based on the actual enumeration number. While federal appellants have arguably produced a genuine factual dispute over whether this diminution in relative population is sufficiently severe to lead to the loss of a congressional seat in appellees' states, they do not so dispute that the relative population of appellees' counties will be markedly smaller under the census sampling plan than under an actual enumeration. These injuries are fairly traceable to appellants' plan and will be redressed by the relief sought.

2. On the merits, appellants' plan to statistically estimate the population violates the specific language of 13 U.S.C. § 195, which authorizes sampling "[e]xcept for" purposes of congressional apportionment. Appellants counter that Congress in 1976 implicitly repealed the 200-year-old prohibition on sampling for congressional apportionment by commanding the Secretary to sample for all nonapportionment purposes and simultaneously conferring unfettered discretion to use sampling for congressional apportionment. This novel interpretation of the Census Act was consistently rejected by appellants themselves when the statute was amended. More importantly, there is no indication, in either the plain language of the statute or the legislative history, let alone clear and manifest evidence, that Congress intended to repeal the prohibition against sampling and to authorize the Secretary to use statistical estimates for apportionment purposes, even when estimates are less accurate.

3. Article I, Section 2 of the Constitution requires that representation be apportioned on the basis of an "actual Enumeration." Since the time of the Founding, this clause has been interpreted to require a physical count of the population. Although the parties disagree as to whether the prospect of increased accuracy would be a *sufficient* condition for a

"major departure" from a traditional enumeration, JA I 263, all agree that increased accuracy is a *necessary* condition for any such deviation from a headcount. Nevertheless, it is undisputed that the Department's plan to deliberately omit 10% of the population, or approximately 27 million persons, from its physical count is *less accurate* than a traditional enumeration would be and therefore would be unconstitutional under *any* proposed standard.

The Department's plan is also flatly inconsistent with the plain language of the Constitution. At the time of the Framing, the term "actual Enumeration" was uniformly understood to require census officials to *count* the population. The Department's plan to statistically estimate the population is invalid because it is not a count. It thus fails to conform with this simple but clear requirement, which was intended to furnish a "permanent and precise standard" for determining the population for apportionment purposes.

ARGUMENT

I. THIS CASE IS JUSTICIABLE NOW.

To satisfy the requirements of Article III, appellees must demonstrate "an injury 'fairly traceable to the [appellants'] allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Appellees challenge both what the appellants have decided not to do – conduct a full headcount of the known population by 2001 – as well as what appellants have decided to do – use a statistically estimated population, instead of an actual enumeration of population, to apportion Congress. Appellants' decision to enumerate only 90%, rather than 100%, of the known population and their distinct decision to statistically estimate the census population currently impose injuries on appellees. JA I 170-71. Article III, therefore, does not affirmatively divest this Court of the power to adjudicate

this important controversy in the timely manner that both political branches desire.[5]

1. For the 2000 census, the Secretary has decided not to conduct an actual enumeration of the sort that appellees maintain is required by the Census Act and the Constitution; that is, an actual headcount of all the known population. Rather, the appellants will enumerate, or count, only the population residing in *90%* of the known households. It will then statistically estimate the population of the remaining 10% of known households (NRFU Sampling) and create an additional number on top of this representing appellants' statistical estimate of the unknown population (ICM Sampling). *See* pp. 2-4, *supra*. Thus, there will not be any 100% enumeration in the year 2000.

This "one number" census is in stark contrast to the 1990 census, where the Secretary produced population results for both the number derived from statistical adjustment and the number produced by the actual enumeration. Appellants' failure to produce both numbers for 2000 means that, absent a contrary decision by this Court, the legally and constitutionally required actual enumeration number will simply not be available for congressional apportionment in 2001. Nor does anyone contend that such a number could be produced in time for the 2002 elections, given the enormous lead time, effort and money needed to produce an actual enumeration for the Nation. JA I 173, 180; JA II 60-61. Accordingly, if, as must be assumed for standing purposes, the actual enumeration number is legally and constitutionally required for congressional apportionment, this mandatory system will not be in place absent judicial intervention now. *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975). While appellants" decision to use statistical estimates for apportionment might be remediable in 2001 if appellants had decided to also produce an actual

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[5] It is undisputed that the 1998 Appropriations Act, signed into law by Appellant Clinton, "eliminates any prudential standing limitations" and thus this case must be decided unless Article III affirmatively prevents the Court from doing so. *Raines v. Byrd*, 117 S. Ct. 2312, 2318 n.3 (1997) (citing *Bennett v. Spear*, 117 S. Ct. 1154, 1162-63 (1997)).

enumeration number, as was done in 1990, their failure to do so means that judicial vindication of appellees' legal rights will be impossible any time after approximately March of 1999.[6] Appellees' injury is thus imminent.

Indeed, for standing purposes, appellants' decision not to calculate the actual enumeration of the population is legally indistinguishable from a decision by the federal government not to conduct the census *at all* or to conduct a census for only, say, 50% of the population. Under appellants' theory, no one would have standing to challenge these facially unconstitutional inactions until 2001, when Congress is statutorily and constitutionally required to apportion representatives. But because plaintiffs' injury would stem from defendants' failure to undertake a required action, their injury would be no different in 2001 than today. Moreover, plaintiffs in such cases would be in no better position in 2001 to make the standing showing that appellants contend is constitutionally required – a comparison of congressional representation under a 100% actual enumeration to congressional representation as it would exist without a new census or under the 50% census. Since no 100% actual enumeration would exist because of defendants' inaction, neither the plaintiffs nor the Court in 2001 would have any better information to determine with precise mathematical certainty whether the nonexistent 100% enumeration would increase plaintiffs' political power relative to the *status quo* of the 1990 census or to the 50% 2000 census. Accordingly, any assertion that plaintiffs may establish standing to challenge a failure to conduct a full census only by showing that they would be better off under a full census than under no census or a partial census is effectively an assertion that the failure to conduct a full census is never justiciable. But presumably even appellants would not

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[6] *Oversight of the 2000 Census: Putting the Dress Rehearsals in Perspective: Hearing Before the Subcomm. on the Census*, 105th Cong. 84 (Mar. 26, 1998) (statement of James Holmes, Director of the Census) ("I must caution that by this time next year [*i.e.*, March 1999] the train for Census 2000 has to be on one track.").

assert that the failure to conduct any census (or a 50% census) is forever immune from judicial scrutiny.

– Precisely the same is true here. The Court will not have any better basis in 2001 to compare the congressional apportionment yielded by a 100% enumeration to that yielded by appellants' sampling plan since the actual enumeration will not have been done, even for comparative purposes. Appellants' decision to conduct a 90% enumeration is different only in degree from a decision to conduct a 50% enumeration or no enumeration at all.[7]

To be sure, appellees' standing here is conceptually somewhat different than in most cases because here, unlike most cases, plaintiffs' injury stems from government's failure to perform an affirmative duty that benefits plaintiffs, rather than from a governmental decision to affirmatively burden plaintiffs. In such rare affirmative duty cases, the only potentially relevant inquiry is whether plaintiffs are in a worse position in the absence of the mandatory action than they would be if the defendants had performed the required action. At most, then, plaintiffs challenging a failure to conduct any census (or half a census) would be required to show that their vote had been diluted because they would enjoy greater congressional representation if the government fulfilled its constitutional duty to conduct the 2000 census than if the government did not. Notably, it is *undisputed* that appellees have made precisely such a showing here. Supported by appellees' uncontested affidavits, the court below found that it is "virtually certain" that the congressional delegation in Georgia, where Appellees Glavin and Byrne reside, would increase from 11 to 12 in 2000 under any census methodology

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[7] This injury is in no way "cured" by appellants' plan to "statistical[ly] estimate," rather than enumerate, the remaining 10% of the population. JA I 170-71. Appellees assert that this 10% statistical estimate is unlawful and a contrary determination cannot be made unless the Court *reaches* the merits.

– a finding appellants have not challenged in any way either below or in this Court. JS 12a; JA II 74, 9, 11.[8]

Thus, the Georgia appellees will not have this additional congressional representation precisely and only because of appellants' failure to conduct the mandated 100% enumeration in time for either appellants or a court to implement apportionment within the constitutionally required 10-year time frame. This injury therefore is fairly – indeed, directly – traceable to appellees' unconstitutional inaction.[9] In short, just as plaintiffs could challenge now a decision to violate the Constitution's directive that "[t]he actual Enumeration shall be made . . . *every* . . . *ten Years*," if the government decided not to conduct any census, so too can appellees challenge the government's decision here not to conduct a full "actual Enumeration." U.S. Const. art. I, § 2 (emphasis added).

Appellants nevertheless insist that the only relevant benchmark for establishing standing is a comparison of congressional representation under the Department's sampling plan with the congressional representation that would exist under the actual enumeration that appellants have decided not to create. Again, this assertion simply fails to recognize that appellees challenge two final decisions by appellants, each of which has a discrete harm: appellees challenge both what appellants have decided to do – use a statistically estimated population for apportionment – and what they have decided *not* to do – conduct an actual enumeration of the population for apportionment. The latter, unconstitutional inaction injures appellees by depriving them of the means to have the

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[8] A similar injury will be visited upon appellees residing in Forsythe County, Georgia and Loudon County, Virginia, whose populations, it is undisputed, have grown faster than the rest of their states since 1990. *See* JS 12a; JA II 75, 9-10.

[9] Moreover, although in the voting context individual plaintiffs have standing even if their concrete injury is "widely shared," appellees here have established a "particularized and differentiated harm" because the injury to Georgia residents will be different than that of states which would not gain additional members of Congress in 2000. *FEC v. Akins*, 118 S. Ct. 1777, 1779 (1998); *id.* at 1791 (Scalia, J., dissenting).

increased congressional representation they plainly would enjoy if the appellants abided by the Constitution and Census Act. This inaction injures appellees by failing to take affirmative steps to alter the *status quo* – a *status quo* that will become unconstitutional and illegal in 2001, but will not be remediable at that late date.

Indeed, appellants' failure here is directly analogous to a state legislature's failure to redraw malapportioned legislative and congressional districts following the decennial census. In such cases, courts have routinely found that plaintiffs have standing to challenge such legislative inaction on vote dilution grounds because the government's *failure* to act condemns plaintiff to the *status quo* of grossly malapportioned districts that could be corrected through timely action.[10] Here, appellants' inaction similarly dilutes appellees' voting strength by condemning them to the *status quo* – a *status quo* that will be unconstitutional in 2001 both because congressional districts will be grossly malapportioned and because appellees will have less congressional representation than they would enjoy if appellants performed their constitutional duty of conducting an actual enumeration. The only difference is that redistricting can be done in a matter of weeks or months, while all agree that an actual enumeration for the Nation will take at least 18 months. *See* n.6, *supra*. Thus, appellees' injury is imminent now but will be irremediable at any point after 1999, at the latest.

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[10] *See Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ([J]udicial relief is appropriate "when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion . . . . "); *Connor v. Finch*, 431 U.S. 407, 415 (1977); *Ely v. Klahr*, 403 U.S. 108, 109-10 (1971). Such inaction becomes justiciable at the point at which the legislature cannot take affirmative action to redistrict in time for the next election cycle. Just as here, the injury in those cases is not dependent on any "hypothetical [future] lawsuit" to enjoin elections premised on the unconstitutional failure to redistrict, but, rather, on the current injury caused by the government's failure to perform its constitutionally mandated duty in the time frame required by the Constitution. Br. II at 34.

Appellants seek to evade this stark reality by making the almost comical assertion that Georgia's vote dilution can be cured by a court in 2001 because, *even absent an actual enumeration*, a court would still likely grant Georgia the "additional seat" they are "virtually certain" to gain. Br. II at 34. But, of course, a federal court cannot simply bestow an extra congressional seat on Georgia without knowing what state the seat *came from* and it cannot make that decision without knowing what all states are entitled to under an actual enumeration population number – the very number that will not be available. On the simplest level, for example, while Georgia is certain to gain at least one seat, it might well be entitled to two additional members of Congress. Moreover, many other states, of course, will gain or lose congressional representation under the new census. Reshuffling these various congressional seats cannot occur absent an enumeration number, which appellants have deliberately decided not to provide. Thus, a court in 2001 would be limited to enjoining the unconstitutional action of statistically estimating the apportionment population, but cannot timely *cure* this violation by putting in place the actual enumeration number which it will not have, and which no one claims can be developed in time for the 2002 elections. The only remedial alternative, then, would be using the 1990 apportionment, which even appellants seem to admit is unacceptable and which will clearly dilute the Georgia appellees' vote. Br. II at 34-35.

2. Appellees have also demonstrated, and the court below found, that they will suffer "several distinct, concrete injuries" as a direct consequence of what appellants have decided to do – use a statistical estimate, rather than an actual enumeration, to determine the census population. JS 9a.

Appellants' initial defense is that appellees must do more than allege in their complaint that they will have a smaller percentage of the population under appellants' sampling plan than under a traditional enumeration. Rather, relying solely upon *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), they argue that appellees must show that there is no genuine factual dispute about such reduced population since appellees moved for summary judgment. In the first place,

Defenders of Wildlife does not govern here since it addressed a plaintiff's burden "[i]n *response* to [a] summary judgment motion." 504 U.S. at 561 (emphasis added). More importantly, under the *Defenders of Wildlife* standard, to establish standing, a plaintiff need only "set forth by affidavit or other evidence specific facts, which for purposes of a summary judgment motion *will be taken to be true*." 504 U.S. at 561 (citations omitted) (emphasis added). Here, appellees have amply satisfied this standard as they have submitted affidavits setting forth specific facts which, if true, establish they will lose voting power and federal aid under the Department's plan.[11]

Similarly, in *Clinton v. City of New York*, 118 S. Ct. 2091 (1998), a case with a procedural posture identical to the instant case, all Justices accepted the allegations contained in plaintiffs' affidavits as true for standing purposes even though the government set forth "specific facts" vigorously disputing these claims of injury. 118 S. Ct. at 2099; *id.* at 2112-13 (Scalia, J., dissenting); Joint Appendix of *Clinton v. City of New York*, No. 97-1374 at 35-40. This Court did not, as appellants' rule would require, remand for a trial on the genuine issues of material fact that were disputed relating to standing, but decided the merits in favor of plaintiffs.

In any event, even if appellees' summary judgment motion on the merits required them to establish entitlement to summary judgment on standing, appellees have satisfied this heightened standard, for there is simply no dispute that the counties in which the individual appellees reside and the county appellees will lose relative population, and thus voting power and federal funds, respectively, under the Department's

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[11] Appellees have also satisfied this standard with respect to their claim of interstate vote dilution. Specifically, Dr. Weber's affidavit demonstrates that the State of Indiana, where appellee Hofmeister resides and votes, is virtually certain to lose a congressional seat solely as a consequence of the Department's methodology. JA II 65, 67. *See Franklin v. Massachusetts*, 505 U.S. 788 (1992). Moreover, contrary to appellants' suggestions, Dr. Weber's methodology did in fact utilize the most recent *projections* available at the time of his analysis.

plan. In stark contrast to appellants' vigorous dispute of the impact of their plan on the State of Indiana's congressional representation, appellants have not even alleged that it is remotely plausible or conceivable that Bergen County, Cumberland County, or Delaware County will have as much relative population under the plan as under an actual enumeration. Nowhere in appellants' briefs in this Court or the lower court, and nowhere in the affidavits they submitted, have they even attempted to introduce " 'specific facts,' " much less " 'significant probative evidence,' " casting doubt on appellees' specific factual showing that these counties will have less relative population under appellants' plan. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)). Rather, appellants have merely raised "metaphysical doubt," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), with various observations about how the future effect of the 2000 census plan is inherently unknowable. But there is no good faith basis for disputing that these counties are " '*likely*' " to "be credited with a smaller percentage of the population than those regions would receive if sampling were not utilized." Br. II at 29, 27 (emphasis added) (quoting *Defenders of Wildlife*, 504 U.S. at 561). In light of appellants' failure to set forth "specific facts" contesting appellees' injuries, there is simply no basis for finding an absence of injury under *any* factual standard. *See* Fed. R. Civ. P. 56(e).[12]

a. The court below found that the Department's plan would dilute the intrastate votes of several appellees because they "reside in counties whose relative population will be diminished by operation of the Department's plan." JS 11a. In fact, under the Department's 1990 Post-Enumeration statistical adjustment, Bergen County, New Jersey, where Appellee McLaughlin resides and votes, and Cumberland County,

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[12] *See Clinton v. City of New York*, 118 S. Ct. at 2101 (quoting *Bryant v. Yellen*, 447 U.S. 352, 368 (1980) (same)).

Pennsylvania, where Appellee Gons resides and votes, both had their population under the statistical adjustment *reduced* below the number of people that were *actually* counted because it was purportedly "more statistically accurate" to conclude that the enumerated people actually did not exist. JA II 128, 129. But for this statistical "adjustment," appellees' counties would have had a larger *absolute* population. When the population of other neighboring counties is being *increased*, this injury is severely compounded because it reduces these counties' *relative* share of population. Having demonstrated with substantial certainty that Bergen County and Cumberland County will suffer a loss of relative population under the Department's plan, based on the 1990 statistical adjustments, appellees have more than carried their burden of showing that it is " 'likely' " that the Department's plan will visit an injury upon Appellees McLaughlin and Gons. *Clinton v. City of New York*, 118 S. Ct. at 2101 (quoting *Bryant v. Yellen*, 447 U.S. 352, 368 (1980)).

Appellants' only response is that the results of the 2000 statistical adjustment are inherently unknowable, notwithstanding the results from the 1990 adjustment, because of the "substantial differences" between the design of their current plan and that of the 1990 PES. Br. II at 14. But appellants cannot and do not contend that these allegedly "substantial differences" (or intervening demographic changes in the counties) make it remotely conceivable that Bergen or Cumberland counties will have the same relative population under the sampling plan as under an enumeration.[13]

Appellants cannot contend that the 2000 census "undercount" and "adjustment" will be materially different than the 1990 "undercount" and "adjustment" because their entire adjustment effort is solely premised on their *own* finding that the 1990 DSE adjustment program is a very reliable predictor

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[13] Indeed, the Fifth Congressional District of New Jersey in which Bergen County is located will be the sixth hardest hit district in the entire country under the Department's plan in terms of its relative loss of voting strength. *See* AFSCME Br. at A-13.

of the results that will occur under the 2000 DSE adjustment program. Specifically, in support of their assertion that their sampling plan will be "more accurate" than a traditional enumeration, the Department made an administrative finding that a traditional enumeration in 2000 will have an "undercount" rate of 1.9% at *every* level of census geography, down to the tract level. JA I 122. This predicted error rate is based *solely* upon the results of the Department's *1990* PES statistical adjustment program, extrapolated forward to 2000. JA I 122-23.[14] Thus, in identifying the expected undercount rate of an enumeration in 2000 that needs to be "corrected," the Department's sole lodestar is the undercount revealed by the 1990 DSE program and it has concluded that the same undercount rate will persist in 2000 down to the tract level, notwithstanding any alleged improvements in increasing the response rate. This finding is essential to the Department's conclusion that their statistical adjustment plan is "more accurate," since it will have an error rate of "only" 1.1% at the tract level, compared to the unadjusted error rate of 1.9%. JA I 122. If the undercount rate of the 1990 DSE "adjustment" program is sufficiently predictive of what will occur in 2000 for appellants to determine the error rate of an unadjusted enumeration down to the tract level, then it is necessarily sufficiently predictive to determine which counties will gain or lose when this error rate is *adjusted*. This is particularly true of counties at the extreme, such as Bergen and Cumberland.[15]

Indeed, prior to this litigation, appellants were not coy about the demonstrable purpose and effect of their statistical

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[14] The error rate would merely have been 1.6%, *i.e.*, the 1990 adjustment rate, except that the Department applied the 1990 adjustment factors to the projected growth in traditionally undercounted demographic groups. JA I 122-23. *See* JA I 48 n.2.

[15] Alternatively, if it is "merely speculative" that the 1990 undercount experience will be repeated in 2000, then appellants have no basis for concluding that their statistical adjustment plan will improve accuracy since they have no idea whether the enumeration "error rate" will be 1.9% or 0.5% or any other number. JA I 122.

sampling program. Rather, the Department's operational plan expressly predicts that "[t]he totals for historically undercounted areas will be much better than those obtained from using traditional methods." JA I 160. Simple arithmetic demonstrates that increasing the representation of these areas necessarily decreases the relative representation of other areas from what they would have enjoyed under the traditional enumeration.[16] Of course, the *non-federal* appellants and their *amici* have no doubt as to who the winners and losers will be under the Department's plan.

This Court has repeatedly held that parties who have been subject to an adverse governmental decision have standing to challenge a future application of a similar decision-making process that gave rise to the past injury. For example, in *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Court considered the standing of nursing home patients who had been subject to a prior illegitimate decision that would have required them to be transferred, which a new entity sought to revive. The Court held that these plaintiffs had standing to challenge the new transfer rules because "in light of similar determinations already made . . . the threat is quite realistic" that the plaintiffs would suffer future injury. 457 U.S. at 1001. Here, the predictive force of the prior "similar determination" is even stronger than in *Blum* because it is the *same* governmental actor, *i.e.*, the Department, whereas in *Blum* the prior

[16] The differences in methodology to which appellants cite relate merely to improvements in the process for increasing the response rate to the initial mailout and have nothing to do with measuring the undercount and adjusting for it. JA I 73-80, 98. Indeed, appellants are "confident" in the DSE methodology for adjusting the 2000 undercount *because* of their 1990 experience and there is no suggestion that the larger, in-state data base for 2000 will change the areas affected by the undercount. JA I 98. The "improvements" are expected to have little overall impact on even the *response* rate since it is expected to be 67% in 2000, as compared to 65% in 1990. JA I 52, 78. Indeed, it will have no discernible effect on the *undercount* rate, which appellants say will be *larger* in 2000 because the undercounted groups will increase in relative size.

determination had been made by a different decision maker. In *Bennett v. Spear*, 117 S. Ct. 1154 (1997), if a new formula had been put in place that resulted in the plaintiffs receiving less water and the government subsequently *readopted* this same formula, the injury requirement of Article III would have been satisfied as the threat of the farmers receiving less water would be both "likely," *City of New York*, 118 S. Ct. at 2101, and "realistic." *Blum*, 457 U.S. at 1001.[17]

Since appellants cannot challenge the factual sufficiency of appellees' intrastate vote dilution showing, they argue that a diminution in a county's share of a state's voting power is never a cognizable injury because, paraphrasing *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), they note that "legislators represent people, not counties." Br. II at 28. *Reynolds* did, indeed, note this truism in concluding that the desire to preserve political subdivision lines cannot *justify* unconstitutionally gross population inequalities in legislative districts, but it simultaneously acknowledged that individual voters' political power was tied directly to the political subdivisions where they resided. The Court repeatedly acknowledged that it was a "clearly rational state policy [to] accord some legislative representation to political subdivisions" because voters in such political subdivisions share a community of interest and therefore it enhances those voters' power to have a representative who advocates those common interests. *See id.* at 1391 ("[L]ocal governmental entities are frequently charged with

[17] Appellees' showing of injury is far stronger than that of other plaintiffs who the Court has found to have standing. For example, in *City of New York*, the Snake River plaintiffs merely contended that they were considering "the possibility" of availing themselves of the vetoed tax benefit and that in the absence of the veto they might have "be[en] able to purchase" a processing facility. 118 S. Ct. at 2112 (Scalia, J., dissenting); *id.* at 2100. Thus, the Snake River plaintiffs' showing of injury was dependent upon their making a final decision to attempt to purchase a processing plant, obtaining financing for such a purchase, locating a willing buyer, and closing on this future, hypothetical purchase.

various responsibilities incident to the operation of state government.").[18] It is for this reason that, as the Court has repeatedly noted, preserving county and other political subdivision lines is a principal redistricting criterion.[19] Thus, to the extent that the population of appellants' counties is reduced relative to others, their political subdivision will form a smaller percentage of the relevant congressional or legislative district and this will reduce their ability to have their representatives advance their unified interests in the legislature.[20] It simply cannot be seriously maintained that adding 250,000 people to New York City would not increase that city's political power relative to the rest of the state and neighboring counties. JA II 123. The same is true, albeit on a somewhat smaller scale, of increasing appellees' counties' relative political population. After all, the primary evil addressed by *Baker v. Carr*, 369 U.S. 186 (1962) and its progeny was that voters of sparsely populated rural counties exercised disproportionate power over their representatives than urban voters. Appellees' injury is simply the flip side of the same coin.

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[18] *See Davis v. Bandemer*, 478 U.S. 109, 167 (1986) ("The concept of representation necessarily applies to groups: groups of voters elect representatives, individual voters do not . . . . ") (Powell, J., concurring in part and dissenting in part). *Franklin*, 505 U.S. at 820 (Stevens, J., concurring) ("[C]rucial representational rights depend on the *census* and apportionment.") (emphasis added).

[19] *See, e.g., Abrams v. Johnson*, 117 S. Ct. 1925, 1949 (1997) (Breyer, J., dissenting); *Bush v. Vera*, 116 S. Ct. 1941, 1953 (1996); *Mahan v. Howell*, 410 U.S. 315, 325 (1973). *See also* N.J. Const., art. IV, § 2, para. 3 ("[N]o county or municipality shall be divided among Assembly districts . . . . ").

[20] *See also Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980), *rev'd on other grounds*, 653 F.2d 732 (1981), *cert. denied*, 455 U.S. 999 (1982); *Ripon Soc'y, Inc. v. National Republican Party*, 525 F.2d 567-71 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976); *City of New York v. United States Dep't of Commerce*, 713 F. Supp. 48 (E.D.N.Y. 1989), *vacated on other grounds*, 34 F.3d 1114 (2d Cir. 1994), *rev'd sub nom., Wisconsin v. City of New York*, 517 U.S. 1 (1996).

Indeed, appellants' entire census plan is premised on the notion that granting certain groups and areas a smaller relative share of the population than they are entitled to "denie[s] [them] an equal voice in their government" and that the " 'differential undercount' . . . raises the possibility of malapportionment." JA I 49; Mem. in Supp. of Defs.' Mot. to Dismiss at 6. If it is true that decreasing the relative population of appellants' preferred groups injures them by diminishing the voting and political power of areas in which they reside, the same is necessarily true of appellees' counties.[21]

Finally, as noted, since the appellants will not ever produce a 100% enumeration, it will not be possible *after* the census is completed to make the factual showing contemplated by appellants, *i.e.*, comparing population levels under the traditional enumeration in 2000 to the results yielded by appellants' plan. In essence, a decision that this case is nonjusticiable would be a holding that the Department's plan will never be subject to judicial review.

b. Appellees have also demonstrated that Appellees Delaware County, Pennsylvania, and DuPage County, Illinois will lose federal funds as a result of the Department's plan.[22] JA II 71-72. Again, the *undisputed* facts establish that, at a minimum, Delaware County would receive more federal funds but for appellants' sampling plan.

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[21] Indeed, under appellants' theory of standing, an effort to *deliberately* diminish the population numbers for areas with high percentages of certain racial or ethnic minorities is nonjusticiable since it visits no tangible injuries on those groups. After all, "individuals" in the undercounted groups can still vote and they may well be placed in a congressional district whose representation is enhanced by virtue of the deliberate undercounting. *See* Br. II at 28.

[22] Appellees filed an unopposed motion for leave to file an amended complaint to add both Delaware County and DuPage County as plaintiffs on May 1, 1998 and the court below plainly treated Delaware County as a party and extensively discussed the injuries suffered by the county. JS 11a-12a. Br. II at II n.1. To remove any conceivable ambiguity, appellees filed a motion to clarify that Delaware County was a plaintiff, and the district court on October 19 granted the motion. App. 1a.

Most directly, it is conceded that Delaware County receives approximately $500,000 under the Social Services Block Grant program ("SSBG"), 42 U.S.C. § 1397, and that the distribution of such funds is based *exclusively* on relative population shares under the most recent decennial census. JA II 80-81. These SSBG funds are distributed to the states, which in turn allocate the money to counties and other local recipients. Under the 1990 PES, Pennsylvania, where Delaware County is located, had the *second lowest adjustment factor* in the Nation and thus was the hardest hit state under the Department's proposed methodology after Rhode Island. JA II 115. Again, appellants have not alleged, much less produced significant probative evidence suggesting, that it is remotely plausible that Pennsylvania will receive as much relative population, and therefore as many SSBG funds, under the Department's plan as it would under the traditional enumeration. Rather, appellants note only that the "SSBG program does not require that a State distribute funds within the State on the basis of population." Br. II at 29. But it does not matter how Pennsylvania ultimately distributes the funds, the only relevant point is that Pennsylvania will have *less* funds to distribute and thus Delaware County's *pro rata* share of that smaller pie will correspondingly decrease under any funding formula. At an absolute minimum, the dual diminution in Pennsylvania and Delaware County's[23] relative population places them at a severe "competitive disadvantage" in securing the limited SSBG funds, which is all that is required when the plaintiff is seeking an economic benefit which the illegal action makes more difficult to obtain.[24]

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[23] The 1990 PES *subtracted* over 2,500 people who had been physically counted in Delaware County to arrive at the final adjusted population numbers for the county. JA II 129.

[24] *Bryant v. Yellen*, 447 U.S. at 367-68; *City of New York*, 118 S. Ct. at 2100 & n.22; *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993). Specifically, in *Bryant*, the Court found that farmers "who had hoped to purchase [ ] excess lands" had standing to challenge the failure to interpret a statute to effectively require the sale of that excess land because it was presumed that this interpretation made it less likely they could purchase the land at a lower price. 447 U.S. at 366. For essentially the same reason, appellee counties' diminished relative population injures them by placing them at a competitive disadvantage for funds under the numerous federal programs that concededly use relative population as *one* of the selection criteria. Br. II at 28-29.

3. Appellants also maintain that appellees lack standing because their injuries are not "fairly traceable" to the Department's plan and cannot be redressed by this Court. Br. II at 29-30. Unsupported by citation to any precedent, appellants maintain that appellees' funding and dilution injuries are not "fairly traceable" to the reduced census population produced by appellants' violation of the Constitution and Census Act, because neither of these two laws requires the *federal* government to distribute *funds* on the basis of census numbers and because no federal law requires *states* to *redistrict* congressional and legislative seats on the basis of census numbers. Br. II at 29, 31. For the third consecutive Term, then, the Solicitor General argues that an injury is "fairly traceable" to a legal violation – and redressable – only if the violation is the *sole and proximate* cause of the injury. *See Bennett*, 117 S. Ct. at 1164; *City of New York*, 118 S. Ct. at 2099. The Court has unanimously rejected this argument in the past two Terms and should plainly do so again. *Bennett*, 117 S. Ct. at 1165; *City of New York*, 118 S. Ct. at 2099; *id.* at 2115 (Scalia, J., dissenting). Specifically, the Court should again affirm that the relevant question is not whether federal and state governments are *required* by the *challenged* laws to base funding and redistricting on the census numbers, but only whether they *do* make funding and redistricting decisions on this basis. Here, they do so because they are required to do so by *other*, previously existing laws and because, as a practical matter, states are "coerced" to do so since the census population is the only practical basis for redistricting. In short, an injury is "fairly traceable" to a violation if the injury would not occur but for the violation.

In *Bennett*, as here, the government argued that plaintiffs' reduced water supply was neither fairly traceable to the government's action or redressable because the Bureau of

Reclamation was not required to accept the conclusion of the Fish and Wildlife Service's Biological Opinion to reduce the irrigation water. In rejecting the government's view, the Court stated:

> [The government's theory] wrongly equates injury fairly traceable to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation. While, as we have said, it does not suffice if the injury complained of is the result of the *independent* action of some third party not before the Court, that does not exclude injury produced by determinative or coercive effect upon the action of someone else.

117 S. Ct. at 1164 (citations omitted) (emphasis in original). Although the Bureau was "technically free" to reject the Wildlife Service's detrimental recommendation, the Bureau had a strong incentive to accept it and it "alter[ed] the legal regime" governing the Bureau's decision. 117 S. Ct. at 1165, 1168. Likewise, just last Term, the Court in *City of New York* rejected the government's argument that the economic injury suffered by the New York hospitals was not caused by the challenged line item veto because it was *state*, not federal, law that passed the costs of the veto onto the plaintiff hospitals. Even though New York State was not "required" to pass these additional costs onto the hospital plaintiffs, the Court found that plaintiffs' injury "[did] not turn on the independent actions of third parties, as existing [state] law [] automatically require[d] that [plaintiffs] reimburse the State." 118 S. Ct. at 2099.

Here, although New Jersey and other states are not required by *federal* law to use census population numbers for state legislative redistricting, appellees' *states'* laws do require use of these numbers.[25] Moreover, of course, states

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[25] *See, e.g.*, N.J. Const. art. IV, § 2, para. 1 ("The Senate shall be composed of forty senators apportioned among Senate districts as nearly as may be according to the number of their inhabitants as reported in the last preceding decennial census of the United States . . . . "); *Hapeville v. Anderson*, 272 S.E.2d 713, 714 (Ga. 1980); Pa. Const. art. 2, § 17; JA I 128 n.5. Moreover, it seems that all states must use census numbers for

are as a practical matter "coerc[ed]" to use federal census numbers because the only alternative is for each state to conduct its own census. This is an enormously time-consuming and expensive task and would cause "the Federal Government and the states [to] rely on different census results," with the resulting confusion that would necessarily entail. *Franklin*, 505 U.S. at 814 (Stevens, J., concurring). Even more obviously, it is irrelevant that the "*Constitution* . . . does not require . . . that federal financial assistance to States or localities must be distributed on the basis of population" since *federal funding laws*, like the SSBG, do require it. Br. II at 31 (emphasis added).

Appellants' redressability argument is without merit for essentially the same reason. For the first time in this Court, the Solicitor General speculates that if the Secretary is prohibited from implementing his current plan to use one set of sampling census numbers for all purposes, because those numbers violate statutory and constitutional requirements for congressional apportionment, the Secretary might alter his plan and produce two sets of census numbers. He might use the traditional enumeration number only for congressional apportionment *among* the states and might use the statistical adjustment numbers for redistricting and funding *within* each state. Br. II at 30. But the diminution in appellees' relative population caused by appellants' plan to base all census numbers on statistical sampling would, by definition, definitely be redressed by an order prohibiting the Secretary from proceeding with that sampling plan. To establish standing, the plaintiff need not go further and speculate about what the Secretary will do when his current program is declared unlawful. As the Court recently emphasized, the fact that the Department "might later, in the exercise of its lawful discretion, reach the same result for a different reason . . . does not destroy Article III 'causation' [because injured

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congressional redistricting. *Karcher v. Daggett*, 462 U.S. 725, 738 (1983) ("[B]ecause the census count represents the best population data available, it is the only basis for good-faith attempts to achieve population equality.") (citations omitted).

plaintiffs] have standing to complain that the agency based its decision upon an improper legal ground." *Akins*, 118 S. Ct. at 1786. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943). This is a much simpler case because it is not asserted that the Secretary might make the *same* decision – a one-number sampling census – after an adverse result, but only that he might embark on an entirely *different* two-number census, part of which is based on sampling.[26]

II. THE CENSUS ACT PROHIBITS USING STATISTICAL SAMPLING TO DETERMINE THE POPULATION FOR CONGRESSIONAL APPORTIONMENT.

Two provisions of the Census Act reference the use of statistical sampling in the decennial census. Consequently, these provisions necessarily overlap and must be reconciled. Section 141(a) requires the Secretary to "take a decennial census of population . . . in such form and content as he may determine, including the use of sampling procedures and special surveys." JS 27a. Standing alone, this provision would authorize the Secretary to sample for all purposes encompassed by the "decennial census of population," including determining the population number to be used for congressional apportionment. Section 195 of the Census Act, however, plainly delimits this open-ended delegation on proper

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[26] We nevertheless note that it is not remotely "feasible" that a *nonpartisan* Secretary would continue with a sampling census, *in addition to* an actual enumeration, after this Court has required an actual enumeration for congressional apportionment. Br. II at 32. For example, after the Court informs the Secretary he must count *100%* of the population, including the 10% of the households the Secretary now plans to statistically estimate, no rational Secretary would nonetheless go ahead and statistically estimate the population of the 10% of known households that have just been actually enumerated. More generally, there is no reason to presume a rational Secretary would violate the heretofore unquestioned principle that " '[t]here can be, for the population at *all* geographic levels at any one point in time, only one set of official government population figures.' " *Franklin*, 505 U.S. at 815 (Stevens, J., concurring) (quoting 55 Fed. Reg. 9,840-41 (1990) (emphasis added)).

census methodology with respect to sampling. Specifically, Section 195 states that, "*Except for the determination of population for purposes of apportionment of Representatives in Congress* . . . , the Secretary shall, *if he considers it feasible*, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." JS 30a (emphasis added).

These partially redundant provisions in the Census Act obviously must be read *in pari materia*, particularly since Section 195 prescribes the "[u]se of sampling" for all "provisions of this title" and preceded Section 141's reference to "sampling." JS 30a. The only reasonable way to harmoniously reconcile these provisions is to conclude that the Secretary may use sampling for all census purposes "[e]xcept for the determination of population for purposes of apportionment." This construction gives both Sections 141 and 195 meaning and logically resolves the interplay between the two provisions. The Secretary retains his broad general discretion to determine the proper methodology for conducting the census, including sampling, save for the particularized constraint contained in the specific statutory provision governing "[u]se of sampling" for all statutory purposes. It preserves Congress' differential treatment of apportionment sampling and other sampling and does not bestow on the Secretary authority Congress expressly intended to withhold, *i.e.*, using statistical sampling to derive the population number for congressional apportionment.

The federal appellants, however, interpret the two provisions as bestowing on the Secretary completely unfettered discretion to use sampling for apportionment purposes whenever he desires to do so, even when sampling is less accurate than traditional enumeration. Thus, the Secretary would have virtually unreviewable authority to sample "*even for*" purposes of congressional apportionment. This, of course, is precisely the authority the Secretary would enjoy if Section 195 were not in the statute at all. Thus, the appellants'

interpretation commits the cardinal sin of statutory construction by rendering Section 195 a nullity with no meaningful effect on the Secretary's authority.[27]

The federal appellants nevertheless suggest that giving Section 195's congressional apportionment exception its intended effect would also somehow commit the same sin by destroying the "internal consistency of the Act as a whole." Br. I at 31. But this is demonstrably untrue and contradicted by appellants' own arguments. Section 195, the specific statutory provision governing the "[u]se of sampling" for all "provisions of this title," simply is a particularized limitation on the Secretary's general discretion to conduct the census in the manner he deems fit. It is a typical feature of administrative statutes that broad general grants of authority are accompanied by specific limitations governing particular aspects of that programmatic responsibility.[28] In such instances, the limitation divests the agency of authority to engage in the specified conduct because "an agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Thus, the Department's broad authority to conduct the census must yield to the specific prohibition against sampling to determine the population for purposes of congressional apportionment.

Surely if the "except for" language were located in Section 141 *itself*, preceding the broad grant of authority to the Secretary, it would obviously prevent him from sampling for purposes of congressional apportionment. There is no coherent reason, consistent with the accepted principle that the statute must be read as a coherent whole, why a different

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[27] *See, e.g., Bennett*, 117 S. Ct. at 1166; *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 100 (1992).

[28] *See, e.g., Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 365-66 (1986); *United States v. Giordano*, 416 U.S. 505, 512-14 (1974); *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932).

result should obtain here simply because the "except for" language is in Section 195, rather than 141.[29]

This is particularly true because it is undisputed and indeed, indisputable, that Section 195 *does* control and limit the general discretionary grants of authority in Section 141 concerning sampling. The appellants argue that the purportedly "mandatory directive" to use sampling for *non-apportionment* purposes in the *second* half of Section 195 completely overrides Section 141's grant of discretionary authority to use sampling whenever the Secretary wants to do so. While, under Section 141 alone, the Secretary decides whether to use sampling for non-apportionment purposes, the use of the word "shall" in the second half of Section 195 overrides this discretionary authority and *requires* the Secretary to use sampling for non-apportionment purposes. *See* Br. I at 28-30.

Thus, all agree that Section 195's specific directive on sampling governs the Secretary's general Section 141 authority on sampling and that the Census Act as a whole draws a clear distinction between apportionment sampling and non-apportionment sampling. Just as Section 195 limits the Secretary's discretion concerning the circumstances in which non-apportionment sampling may be used, so too does it limit his discretion concerning the proper purposes for which sampling may be used, by excepting congressional apportionment from those authorized purposes. Since it is clear and undisputed that the second half of Section 195 governs Section 141's general grant of authority, there is no consistent or rational reason that the "except for" language in the same provision should not also be read into Section 141 to delimit that general grant of authority. This is particularly true since it is a venerable principle of statutory construction that a specific provision controls a general one.[30]

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[29] *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981); *Richards v. United States*, 369 U.S. 1, 11 (1962).

[30] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989); *HCSC-*

Thus, there is simply no basis for the federal appellants' contention that interpreting the express language of Section 195 to limit Section 141's general delegation renders the statute internally inconsistent or violates any other principle of statutory construction. The federal appellants' arguments would therefore be untenable even absent consideration of prior versions of the Census Act. Consideration of that statute's evolution, however, further reinforces that the 1976 amendments to the Act did not grant the Secretary the unprecedented and momentous authority to determine apportionment of congressional representatives pursuant to "sampling procedure and special surveys." All agree that, prior to the 1976 amendments, the Census Act plainly held that the Secretary *may* sample for non-apportionment purposes but *may not* sample for apportionment purposes – precisely the statutory construction adopted by the courts below. Br. I at 32. If this prohibition was to be repealed, therefore, it is well established that "[t]he intention of the legislature to repeal 'must be clear and manifest.' " *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)); *TVA v. Hill*, 437 U.S. 153, 189 (1978); *United States v. Sweet*, 245 U.S. 563, 571 (1918).[31] Moreover, "[t]his long-established canon of construction carries special weight when an implied repeal or amendment might raise constitutional questions." *St. Marten Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981) (citing *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979)).

Federal appellants argue that the 1976 amendments did clearly constitute a change in the Secretary's authority, which

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Laundry v. United States, 450 U.S. 1, 6 (1981); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957).

[31] This "cardinal rule [ ] that repeals by implication are not favored" applies with equal force where the subsequent version of the same statute amends a prior provision of the statute at issue. *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *St. Marten Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981); *Sampayo v. Bank of Nova Scotia*, 313 U.S. 270 (1941); *Wood v. United States*, 41 U.S. 342, 363-65 (1842) (Story, J.).

reversed *both* aspects of his authority on sampling. Rather than being *authorized* to do non-apportionment sampling and *prohibited* from apportionment sampling, the 1976 amendments *required* the Secretary to use non-apportionment sampling and *authorized* him to do apportionment sampling. This dramatic, simultaneous contraction and expansion of the Secretary's authority, however, was accomplished in a very odd and extraordinarily oblique manner. Congress did not delete the "except for" limitation from Section 195 nor otherwise modify the Census Act to state that the Secretary's pre-existing discretion to use sampling had now been extended to the constitutionally-mandated and politically sensitive area of congressional apportionment. *But see Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994). This "clear" directive to engage in the momentous change was in no way even hinted at in any hearing or legislative history relating to the 1976 amendments and was affirmatively *denied* by federal appellants themselves many years thereafter.[32] *Cf. Chisom v.*

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[32] Vincent Barraba, the Director of the Census Bureau for the Carter Administration, stated in a 1980 report on the subject of sampling: "[I]n *Section 195* of Title 13, the Congress *expressly prohibited* the use of sampling in the apportionment process." 45 Fed. Reg. 69,366, 69,372 (Oct. 20, 1980) (emphasis added). Likewise, the Department of Justice has repeatedly stated in submissions to other courts "that the Census Act precludes the utilization of statistical adjustment for the purpose of apportioning representatives . . . [and] that 13 U.S.C. § *195* prohibits the use of adjustment for this purpose." *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980) (emphasis added). Thus, prior to 1990, it was uniformly contended that Section 195 *prohibited* sampling for purposes of congressional apportionment. *See, e.g., Orr v. Baldridge*, Cause No. 1F 81-604-C (S.D. Ind. 1985). Since 1990, some government lawyers have argued that Section 195's prohibition might not foreclose an *upward* adjustment of a *100%* headcount to *improve* accuracy. Memorandum of Stuart Gerson, Ass't Atty. Gen. at 1 (July 18, 1991); Statement of Sec'y Mosbacher, 56 Fed. Reg. 33,582, 33,605 (July 22, 1991) ("[U]nambiguous accuracy" is "the *sine qua non*" justifying a statistical adjustment.). But prior to this litigation, it was agreed that using a statistical estimate *in place of* an enumeration (like the appellants 10% NRFU sampling) was impermissible and no one contended, as the Solicitor General does here,

Roemer, 501 U.S. 380, 396 & n.23 (1991); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

Federal appellants nevertheless maintain that this clear repeal occurred in two ways. In the lower courts in these consolidated cases, while the federal appellants conceded that an exception from discretionary authority constituted a prohibition on the excepted activity, it asserted that an exception from a mandatory directive was not a prohibition. *House* JS 51a. Therefore, the alleged alteration of the second half of Section 195 from "discretionary" to "mandatory" in 1976 removed the prohibition on congressional apportionment sampling that existed prior to that amendment. For the first time in this Court, appellants now also maintain that Section 195, whether mandatory *or* discretionary, does not withdraw sampling authority for congressional apportionment and thus *never* prohibited congressional apportionment sampling even when Section 195 was in its "discretionary" form. Rather, we are now informed, the *only* obstacle that ever existed with respect to congressional apportionment sampling was Section 141's implicit prohibition of such sampling. Section 141 was therefore the only section that needed to be altered to vest the Secretary with authority to sample for congressional apportionment, even if Section 195 remained precisely the same. Br. I at 37. For the reasons that follow, neither version of the federal appellants' *post hoc* arguments construing the Secretary's authority can withstand scrutiny.

1. The federal appellants' principal argument here (and exclusive argument below) is that the 1976 amendments to the

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that Section 195 places *no* constraint on the Secretary's apportionment sampling discretion or that Section 195 *mandates* nonapportionment sampling. JA I 135; Memorandum of Walter Dellinger, Oct. 7, 1994, at 12-14; Statement of Sec'y Mosbacher, *supra*; Gerson Memorandum at 18 ("Section 195 on its face prohibits" either all statistical adjustment or, at a minimum, "a statistical adjustment carried out as a substitute for a headcount."). *See also Carey*, 508 F. Supp. at 414-15; *Young v. Klutznick*, 497 F. Supp. 1318, 1333 (E.D. Mich. 1980), *rev'd*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982).

second half of Section 195 impose a "mandatory directive" to use sampling for all non-apportionment purposes. According to the federal appellants, this somehow authorized congressional apportionment sampling because an exception to a "mandatory directive," unlike an exception to discretionary authority, does not constitute a prohibition against the agency engaging in the excepted activity. Br. I at 29.

The short answer to this contention is that modification of the second half of Section 195 simply strengthened Congress' encouragement of sampling for authorized purposes, but did not *expand* the purposes for which sampling was authorized to encompass congressional apportionment. Changing the second half of Section 195 to say that the Secretary "should" or "must" sample, rather than "may" sample, in no way changes the fact that this encouragement or authorization extends only to those purposes of the census "except for" congressional apportionment. If Congress intended to alter the scope of the objectives for which sampling could be used, it would not have strengthened its directive to encourage sampling for *existing* purposes, but it would have expanded the purposes for which sampling could be used. This could reasonably be done only by eliminating the "except for" limitation contained in Section 195 and Congress deliberately chose not to do so.

To be sure, the 1976 Congress unanimously made the uncontroversial, "cost-saving" policy decision that the Secretary should use sampling for the numerous functions of the census that are not constitutionally required and which have no political effect on individual congressmen or their states. As the legislative history and Census Bureau's contemporaneous statements make absolutely clear, however, Congress never contemplated the controversial, unprecedented decision of altering the traditional method for conducting the only constitutionally-required purpose of the census, and the only one which so directly affected the political fortunes of members of Congress and the states they represent. To the contrary, "[t]he main purpose of the 1976 amendment [of Section 141] was to provide for a mid-decade census to be used for

purposes (not including apportionment)" and "[t]he legislative history evidences *no intention* to expand the scope of the Secretary's discretion." *Franklin*, 505 U.S. at 816 n.16 (Stevens, J., concurring) (emphasis added).

In this regard, it must be recognized that, according to the federal appellants, Congress granted the Secretary wholly unfettered authority to base congressional apportionment on sampling, or the "special surveys" authorized by Section 141, even if these "experimental" procedures remained *less accurate* than traditional enumeration. Gephart Br. at 30; JA I 348-49. There is no explicit or implicit requirement in Section 141 (or anywhere else in the Census Act) that sampling may be done only if it is as accurate as an enumeration, and there was no expectation that statistically estimating the number of, say, tractors in the United States would be more accurate than actually counting them. Rather, as the federal appellants correctly note, it was believed that the *sacrifices* in accuracy were justified by the cost savings entailed in sampling. Br. I at 30. Since the federal appellants maintain that the Secretary's authority for congressional apportionment sampling is found in Section 141, this necessarily means that Congress purportedly authorized the Secretary to statistically estimate the congressional apportionment population without cabining that discretion in any way and without regard to whether that statistical estimate was even arguably as accurate as an enumeration.[33]

Since all agree that it would be unconstitutional to replace a traditional enumeration with sampling unless that

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[33] Indeed, the federal appellants acknowledge that Congress exempted congressional apportionment from the "mandatory" strictures of Section 195 because it created the potential for the Secretary to use apportionment sampling even if it was less accurate than enumeration. Br. I at 30. But for the same reason that Congress would not *mandate*, under Section 195, that the Secretary engage in apportionment sampling if it were potentially less accurate, it would never have *authorized* the Secretary, under Section 141, to engage in apportionment sampling if it were potentially less accurate.

statistical estimate was more "accurate," the federal appellants' interpretation of the Census Act would vest the Secretary with authority to conduct a census that is manifestly unconstitutional under all theories. Moreover, even if sampling is purportedly more accurate, any use of it for congressional apportionment, at a minimum, raises serious constitutional concerns because it is not an "actual Enumeration." (*See infra* 41-50). Standing alone, these significant constitutional difficulties render the federal appellants construction of the Census Act unacceptable.[34] Wholly apart from these constitutional concerns, however, it is extraordinarily implausible that the 1976 Congress would micromanage the Secretary's methodology for determining the population of tractors, etc., through a statutory "mandate," but simultaneously enable the Secretary, for the first time in United States history, to determine politically sensitive congressional apportionment without providing any standard – including accuracy – for guiding this unprecedented discretion.

More generally, the appellants' argument is plainly wrong because an exception from a mandate does constitute a prohibition on agency action[35] and, in any event, the second

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[34] *Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (A court "will construe [a] statute to avoid such [constitutional] problems unless such construction is *plainly contrary* to the intent of Congress.") (emphasis added); *Miller v. Johnson*, 515 U.S. 900, 923 (1995); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989); *Hooper v. California*, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."). Of course, the Court's decision in *Wisconsin* makes clear that an interpretation of the Census Act which prohibits sampling to determine the population for purposes of congressional apportionment would not pose any constitutional issues.

[35] There are numerous examples in the United States Code of statutes in which an exception from a mandate is a prohibition. *See, e.g.*, 22 U.S.C. § 5605(a)(1); 16 U.S.C. § 45(f); 7 U.S.C. § 79(j)(1); 22 U.S.C. § 2452a(b).

half of Section 195 is not a "mandatory directive." As a matter of common usage, an exception from a command is most naturally read as a prohibition. Thus, there would be no doubt that the following exception constituted a prohibition: "except for my grandmother's wedding dress, you shall take the contents of my closet to the cleaners." *House* JS App. 53a. In this example, the context makes clear that the exception constitutes a prohibition. Here, the 180-year practice of conducting the census on the basis of a headcount provides the context for determining the meaning of Section 195. This historical background strongly suggests that the exception in Section 195 was intended to continue the prohibition against sampling for Congressional apportionment. A contrary conclusion can only be reached by ignoring the long-standing history of the census and the grave constitutional concerns that would be raised by this interpretation.[36]

In any event, Section 195 is plainly not a "mandatory directive." Section 195 provides that "the Secretary shall, *if*

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[36] The language of the Constitution itself further refutes the government's contention that an exception to a requirement is not a prohibition. Specifically, Section 2 of the Fourteenth Amendment provides in relevant part that "when the right to vote . . . is denied to any of the male inhabitants of such State . . . *except for* participation in rebellion, or other crime, the basis of representation therein *shall be reduced* in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. Const. amend. XIV, § 2 (emphasis added). Thus, the Fourteenth Amendment is mandatory insofar as it requires the relative representation of each state to be reduced to the extent adult males are disenfranchised. The amendment contains an exception to this mandatory rule for disenfranchisement of those who had participated in "rebellion" or other crimes. It is clear that this exception did in fact constitute a prohibition against penalizing (by reducing their population) states that disenfranchised sympathizers to the Confederacy. *See, e.g., Richardson v. Ramirez*, 418 U.S. 24, 43 (1974) (holding that the "except for" "language of § 2 expressly exempts from the sanction of that section disenfranchisement grounded on prior conviction of a felony"). Thus, the Fourteenth Amendment plainly demonstrates that an exception to a requirement does in fact operate as a prohibition against application of that provision.

he considers it feasible, authorize the use of the statistical method known as 'sampling'. . . . " 13 U.S.C. § 195 (emphasis added). On its face, Section 195 does not mandate the use of sampling, but simply requires it if and when the *Secretary*, in *his* discretion, considers it *feasible*.

This Court has consistently recoghized that such a formulation vests an administrative agency with discretionary authority and is not tantamount to a mandate. Thus, in *Anderson v. Edwards*, 514 U.S. 143, 154 (1995), the Court held that a federal statute providing that a state agency "shall . . . take into consideration any . . . income and resources of any child or relative claiming [AFDC assistance]" was permissive insofar as it "allow[ed]" states to take into consideration such income. Likewise, in *Young v. Community Nutrition Inst.*, 476 U.S. 974, 980 (1986), the Court concluded that a statutory provision specifying that the Commissioner of the Food and Drug Administration "shall" promulgate regulations "to such extent as he finds necessary" was a discretionary grant of authority. The conclusion that Section 195 must be construed as a permissive grant of authority is bolstered by the fact that it merely specifies that the Secretary consider whether sampling is "feasible." It is widely recognized that "statutory language such as 'feasible' . . . [is] language that on its face suggests a broad delegation to an agency to strike the policy balance." Laurence Silberman, *Chevron-The Intersection of Law and Policy*, 58 Geo. Wash. L. Rev. 821, 823 (1991). *See, e.g., American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-11 (1981); *id.* at 544 (Rehnquist, J., dissenting); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987) (recognizing that statutory language directing that an agency "shall as far as possible facilitate" certain activity is "precatory" not mandatory). In short, the statutory language specifying the "consideration" of the "feasibility" of sampling can only be understood as vesting the Secretary with discretion to sample. Indeed, construing Section 195 as appellants suggest would impose the entirely absurd requirement that the Secretary produce *two conflicting* sets of census population figures if he chose to base congressional apportionment on the traditional

enumeration, a result which presumably not even appellants would defend.[37]

Indeed, although their brief throughout refers to the current Section 195 as a "mandatory directive," the federal appellants concede in a footnote that Section 195 is not "mandatory" because the Secretary "retains meaningful discretion to determine whether sampling should be employed in a particular instance." Br. I at 28 n.14. Thus, even if an exception to a mandate did not constitute a prohibition, this

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[37] As appellants repeatedly note, the only population number needed for purposes of "apportionment of representatives" under Section 195 is each state's *total* population. Br. II at 30-31. Thus, under appellants' mandatory understanding of Section 195, *all* other population figures – including all racial data, family data and all "population figures for substate areas," such as counties – *must* be based on a sampling number. *Id.* at 31. These population figures within a state are not calculated for purposes of apportionment, but for other purposes, and thus must be done pursuant to sampling, even if the apportionment number is based on a traditional enumeration. Accordingly, under appellants' theory, if the Secretary after 1976 continued to conduct the census pursuant to a traditional enumeration, he could only use those traditional census figures for determining how to apportion congressional districts among the states. But, pursuant to the congressional mandate, he would also have to produce *another* census population figure, based on sampling, which differed from the traditional enumeration number. The substate population figures would have to be based on this sampling number, since those substate figures play no role in apportioning members of Congress among the states. Since no rational Secretary would go through the waste and confusion of producing two different population figures for each state, the only rational choice would be to use the sampling numbers for apportionment purposes as well. But even appellees agree that the 1976 Congress would have never *required* the Secretary to use sampling procedures for congressional apportionment, so Congress would have never effectively required such action by forcing the Secretary to either apportion on the basis of the sampling number or produce two, inconsistent census population figures. Needless to say, no Court and no one in the Commerce Department, including the *current* Commerce Department, has ever interpreted Section 195 in the manner the Justice Department now does for purposes of this litigation. *See* n.32, *supra*.

does not avail appellants here because it is now undisputed that Section 195 is not such a mandate.

2. Apparently recognizing this, and recognizing that the 1976 amendments to the Census Act cannot constitute an explicit repeal, the United States now alternatively argues that it is legally irrelevant whether Section 195 is "discretionary" or "mandatory," for it is not a prohibition in *either* event. Rather, Section 141 was and is the only limitation on sampling for congressional apportionment in the Census Act. Prior to 1976, Section 141's authorization to conduct a "census" was purportedly believed to implicitly forbid apportionment sampling (although it really did not). Thus, it is argued, amendment of Section 141 in 1976 to generally authorize sampling was all that was needed to authorize apportionment sampling, even if Section 195 remained wholly discretionary. Br. I at 32, 37-38.

While this would be a convincing argument if Section 141(a) were the only provision of the Census Act governing sampling, it is, for the reasons already noted, inherently erroneous because it ignores and eviscerates the plain limitation on the Secretary's authority contained in Section 195. The federal appellants apparently advance the following method of statutory construction. If Section A of the statute says, "except for congressional apportionment, sampling may generally be done," then the Secretary has no authority to sample for congressional apportionment. But if Section A says, "sampling may generally be done," and Section B says "except for congressional apportionment, sampling may generally be done," then the Secretary may use sampling even for congressional apportionment. But there is simply no reason to interpret these two statutes in a fundamentally different manner. Both plainly withhold authority to sample for congressional apportionment. Granting such authority under either version of the statute therefore renders the exception for congressional apportionment a nullity.

To be sure, the second version of the statute, like the Census Act, contains some redundancy in its treatment of sampling. But this redundancy is inherent in the fact that the

Census Act refers to sampling in two places that affect congressional apportionment, as well as two other sections that do not implicate congressional apportionment. *See* 13 U.S.C. §§ 141(d), 181. These multiple references to sampling necessarily overlap and must be coherently reconciled. The only way to do this is to either acknowledge that the more specific Section 195 delimits the general authority bestowed by Section 141(a) and (d) (and Section 181) or to conclude that Section 141 bestows an authority that is wholly independent of the constraints imposed by Section 195. For the reasons noted, it is clear that *both* parts of Section 195's specific guidance on census sampling – the stronger encouragement of sampling *and* the exclusion of congressional apportionment – govern and cabin the other statutory references.

Indeed, the federal appellants' extensive disquisition on the 1957 and 1976 amendments bolsters this point. The appellants' brief makes clear that everyone in 1957 and 1976 understood that Section 195 was the provision governing permissible use of sampling, without regard to whatever authorization or limitation was contained in Section 141. According to federal appellants, the alleged general prohibition on sampling contained in the 1957 version of Section 141 was overridden by Section 195's specific authorization of sampling. Br. I at 38 n.22. Just as Section 141's general *prohibition* on non-apportionment sampling in the 1957 version was overridden by Section 195's specific authorization, so too is Section 141's general *authorization* of sampling in the current version overridden by Section 195's specific limitation. Since it is undisputed that the 1976 Congress believed that Section 195 was the provision governing sampling, and it is clear that Section 195 withheld authority for apportionment sampling, the 1976 Congress could not have intended to vest such apportionment sampling authority without eliminating the "except for" language in Section 195.[38]

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[38] Although their entire argument is premised on the notion that Section 141 was a "pre-existing ban" on apportionment sampling prior to 1976, the federal appellants themselves simultaneously assert that Section 141 probably did not, in fact, prohibit sampling if it was supplemental to some effort at actual enumeration. Br. I at 36 n.19. Thus, according to federal appellants, even though Section 141 did not ban sampling before 1976, overturning this non-existent ban in 1976 was all that was needed to authorize apportionment sampling even though Section 195 continued to deny authority for apportionment sampling before and after 1976. Even if this were not the fifth different variation on the Justice Department's increasingly strained interpretation of Section 141, simply stating this argument would refute it.

III. THE DEPARTMENT'S SAMPLING PLAN VIOLATES THE CONSTITUTION'S PLAIN LANGUAGE.

1. It is seemingly common ground among the parties that a "significant change from the traditional method of conducting the census" is constitutional only if it is shown, or at least contended, that the statistical estimate will produce a *more accurate* tally than the traditional enumeration. JA I 133-35; Br. I at 36 n.19, 47; U.S. Br. in Opp. to Summ. Jgmt. at 14. But the Department's plan is still unconstitutional even under *appellants'* "improved accuracy" standard for it is *undisputed* that statistically estimating the 10 percent of the population not responding to census questionnaires is less accurate than actually following up and doing a headcount of those persons. *See, e.g.*, 1997 GAO Report at 26 ("Technically the *most accurate* design alternative, according to the results of the *Bureau's research*, would be to attempt 100-percent follow-up of nonrespondents and use ICM to address accuracy problems.") (emphasis added).

Indeed, we know that actually following up on the 12 million households excluded from the follow-up would be more accurate than the statistical estimate. Specifically, the *Report to Congress* contends that appellants will count *each* of the households which it has selected for nonresponse follow-up, and thus that they are entirely confident they will reach the goal of 90 percent of the households in each census tract. JA I 170, 88. By the same token, they could count each of the

households in the remaining 10 percent that they have arbitrarily excluded. These 10% of households are no more difficult to count than the nonresponding households who will be enumerated since the excluded 10% are *randomly selected*. JA I 90.

Why then is the Department statistically *estimating* the population of the remaining 10 percent of the households they know exist and are occupied, rather than actually following up and counting those people? The Department candidly acknowledges that it has nothing to do with improved accuracy or correcting any "undercount," but is being done solely to save time and money.[39]

Thus, even if the Constitution permits an upward adjustment to "correct" the "undercount" of people missed by traditional enumeration, the Department's plan is still invalid because it *substitutes* a statistical estimation for a headcount of known people who could be counted *more* accurately than estimated. Obviously, the administrative convenience of saving "time and effort" cannot justify departing from constitutional norms. Given that such a traditional headcount would yield more accurate results than simply assuming the excluded 10% have the same demographic characteristics of other nonresponding households, there is simply no basis for upholding the appellants' plan to use this less accurate assumption. A contrary conclusion would mean that the Constitution permits the Department to count 60% or 40% of the population and statistically infer the remainder to save "time and money."[40]

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[39] *See* Panel to Evaluate Alternative Census Methods, *Counting People in the Information Age* at 100 ("Whether to use sampling for NRFU in the 2000 census is mainly a policy decision about whether the expected cost savings from the use of sampling outweigh the likely decreases in the accuracy of counts and other data, particularly for small areas.") (*cited in Report to Congress*, JA I 54); JA I 89.

[40] In the court below, appellants maintained that this concededly less accurate 10% NRFU sampling policy is somehow immune from judicial invalidation because their *other* sampling policy – the ICM statistical adjustment *above* the initial 100 percent estimate to capture unknown persons – is purportedly more "accurate" than a 100% headcount of the known persons. Under this view, the appellants could decline to count any people over 70 years old and this arbitrary exclusion would be immune from judicial scrutiny so long as the census in the "aggregate" ensured that each state received a more "accurate" number of persons than it would through a headcount. Needless to say, federal courts have not only "the power but the duty" to enjoin *any* departure from constitutional norms. *Louisiana v. United States*, 380 U.S. 145, 154 (1965). These unconstitutional defects cannot be ignored – or cured – simply because *another* aspect of the census is alleged to be constitutional because it is more accurate.

2. The elaborate statistical estimate that the Department intends to undertake stands in stark contrast to the Constitution's simple but clear requirement that representation be apportioned in accordance with an "actual Enumeration" which "count[s] . . . the whole number of persons." U.S. Const. art. I, § 2; *id.* amend. XIV, § 2. Where, as here, the language of the Constitution is clear, this Court has consistently held that the plain language of the Constitution must be given effect and may not be contravened.[41] Here, the Constitution's language is quite straightforward and conducive to simple implementation.

Article I, Section 2 mandates that an "actual Enumeration" must serve as the basis of apportioning representation. The plain meaning of this provision was clear and unambiguous at the time of the Framing of the Constitution. In 1789, "enumerate" meant to "count" and plainly did not mean to "accurately estimate." *See, e.g.*, Samuel Johnson,

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[41] *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824) ("As men, whose intentions require no concealment, generally employed the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618 (1895) ("[T]he words of the constitution are to be taken in their obvious sense. . . . "); *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Rhode Island v. Massachusetts*, 37 U.S. 657, 721 (1838).

A Dictionary of the English Language (1773) (defining "enumerate" to mean "to reckon up singly, to count over distinctly"); Noah Webster, *American Dictionary of the English Language* (1828) (defining "enumerate" to mean "to count or tell, number by number; to reckon or mention a number of things, each separately").[42] Both "enumeration" and "enumerate" derive from the Latin word "*enumerare*" which meant to "count out." *Barnhart Dictionary of Etymology* (1988) 334. Indeed, the word "count" is often defined as "enumerate."[43]

"Enumeration," of course, is simply the noun for the verb "enumerate." Therefore, an "enumeration" is the act of enumerating, or counting, just as a prosecution is the act of prosecuting. Not surprisingly, then, enumeration is also defined as "the act of counting or telling a number, by naming each particular; an account of a number of things, in which mention is made of every particular article." Noah Webster, *American Dictionary of the English Language* (1828). *See*

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[42] *See also* John Walker, *A Critical Pronouncing Dictionary* (1794) ("enumerate" defined as "to reckon up singly, to count over distinctly"); Thomas Sheridan, *A General Dictionary of the English Language* (1780) (defining "enumerate" to mean "to reckon up singly, to count over distinctly"). Although modern dictionaries are irrelevant to a determination of the Framers' intent, they continue to adhere to this definition. *See, e.g., Webster's II New College Dictionary* (1995) (defining "enumerate" to mean "to name or count off one by one: list; to determine the number of: count").

[43] *See, e.g.,* Noah Webster, *American Dictionary of the English Language* (1870) (defining the term "count" to mean "to tell or name one by one, or by groups, for the purpose of ascertaining the whole number of units in a collection; to number; to *enumerate*") (emphasis added). Thus, Section 2 of the Fourteenth Amendment reinforces this constitutional command. U.S. Const. amend. XIV ("Representatives shall be apportioned among the several States according to their respective numbers, *counting* the whole number of persons in each State, excluding Indians not taxed.") (emphasis added). Thus, a census that is not based upon a "count" of the population does not satisfy either Article I, Section 2 or the Fourteenth Amendment.

also Samuel Johnson, *A Dictionary of the English Language* (1773) (defining enumeration as "the act of numbering or counting over").[44] Indeed, in *Wisconsin*, the Court used the term, "enumeration" in contradistinction to the scientific statistical adjustment or estimate proposed by appellants: "We are not sure why the fact that distributive and numerical accuracy correlate closely in an improved *enumeration* would require the Secretary to conclude that they correlate also for a PES-based *statistical adjustment*." *Wisconsin*, 517 U.S. at 21 (emphasis in original). *See also Franklin*, 505 U.S. at 803 (" '[A]ctual Enumeration' " is "a count of the persons 'in' each sstate".).

In the face of all this, relying exclusively on a *1933* version of *British* dictionary, appellants argue that "enumeration" means "the action of ascertaining the number of something; the taking [of] a census of population; a census." 3 *Oxford English Dictionary* 227 (1933). Br. I at 40. Thus, appellants assert that *any* "systematic" method of ascertaining a population number – even if the method of ascertainment is not a count, but a gross estimate – constitutes an "enumeration." But this effort at linguistic legerdemain drains the phrase "actual Enumeration" of any meaningful content, distorts even the one dictionary quoted from and is an anachronistic effort to impose 20th century ambiguity upon a phrase free from such ambiguity when enshrined in the Constitution.

The *Oxford English Dictionary,* like other modern dictionaries, defines enumerate as "[t]o count, ascertain the number of." When the dictionary then defines the noun emanating from this verb, it does not again specify that a "count" is the means of ascertaining the number of something, but that is plainly the intent, as further evidenced by the fact that each of the usage examples of "enumeration" is an actual count of

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[44] The phrase "enumeration" is also used in the Ninth Amendment. The meaning of "enumeration" in the Ninth Amendment is "the act of counting or telling a number, by naming each particular; and a count of a number of things in which mention is made of every particular article." Noah Webster, *American Dictionary of the English Language* (1828). Again, the clear sense of the term is individual counting or listing.

things or persons.[45] No dictionary anywhere lists "accurate estimate" as one of the possible meanings of enumeration.

In any event, it is hardly surprising that modern dictionaries list enumeration as a rough synonym for a census to ascertain a population since the decennial census to ascertain the population has always been done through an "enumeration" and thus the meanings of the two words have converged. But this in no way suggests that the Framers' usage of either "enumeration" or "census" denoted *any* means of ascertaining the population, including an estimate based on a partial headcount. Rather, both phrases, consistent with ancient historical practices, denoted an actual headcount of the population.[46] As appellants themselves note, the 20th century Commerce Department believed that its authorization to conduct the "census" prohibited it from using statistical sampling because "[i]t has generally been held that the term 'census' implies a complete enumeration," not a partial or initial enumeration supplemented by a statistical adjustment. Br. I at 33 (citations omitted).[47]

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[45] *See Oxford English Dictionary* 311 (1989). The 1577 example, referenced by appellants, is simply "that holy man did rightly know the enumeration of the sacred Trinitie." The "holy man" thus was able to list or count the Trinity.

[46] Webster defined "census" in the following manner: "(1) In ancient Rome, an authentic declaration made before the censors, by the citizens, of their names and places of abode. This declaration was registered, and contained an *enumeration* of all their lands and estates, their quantity and quality, with their wives, children, domestics, tenants and slaves of each citizen. . . . (2) In the United States of America, an *enumeration* of the inhabitants of all the States. . . . " *American Dictionary of the English Language* (1828) (emphasis added).

[47] Appellants' understanding of "enumeration" as a contentless standard that encompasses any methodology, however conjectural, of ascertaining the number of inhabitants is also irreconcilable with the requirement that there be an "actual" count. The term "actual" was uniformly understood at the time of the Framing to mean "really in act, not merely potential." John Walker, *A Critical Pronouncing Dictionary* (1794). *See also* Samuel Johnson, *A Dictionary of the English Language* (1773)

Finally, the appellants' proposed definition of "an actual enumeration" proves far too much because it authorizes a census methodology that is contrary to *all* parties' understanding of the Constitution's rule and the Framers' intent. If "enumeration" denotes *any* method of ascertainment, then the population could be apportioned on the basis of the "special surveys" (analogous to public opinion polls) that are allegedly authorized by the Census Act, without regard to whether this methodology is more accurate than a headcount. 13 U.S.C. § 141(a). But the first apportionment of Congress by the Constitutional Convention was itself based on a rough estimate of population and it is common ground that the "actual Enumeration" requirement was intended to henceforth forever foreclose using such a "conjectural rule" as the basis for

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("really in act; not purely in speculation"); Stephen Jones, *Dictionary of the English Language* (1801) ("real, true, positive"). Thus, the Constitution requires that the enumeration or count be "really in act." Appellants make the unwarranted suggestion that this Court should defer to the "second to last draft" of the Census Clause. Br. I at 43-44; *Nixon v. United States*, 506 U.S. 224, 231-32 (1993). It should be rejected as inconsistent "with the well-established rule that the plain language of the enacted text is the best indicator of intent." *Id.* If anything, the fact that the penultimate draft was not enacted suggests that the Framers *intentionally* rejected the penultimate draft's authorization to conduct the census in any manner Congress deemed acceptable. Moreover, the record of the Constitutional Convention confirms that the Framers sought to establish a "permanent and precise standard" of ascertaining the population that would "t[ie] the hands" of future Congresses so that they "could not sacrifice their trust to momentary considerations." *See* 1 *Records of the Federal Convention of 1787* 578, 580 (Max Farrand ed., 1911). The advantages of apportioning representation on the basis of a headcount were plain: "This [method] had the recommendation of great simplicity and uniformity in its operation, of being generally acceptable to the people, and of being less open to fraud and evasion, than any other, which could be devised." II Joseph Story, *Commentaries on the Constitution of the United States* § 633 (1833). *See also* III Joseph Story, *Commentaries on the Constitution of the United States* § 676, at 143 (1833) ("[T]he rule" established by the Constitution was intended "always [to] work the same way in regard to all of the states, and be as little open to cavil, or controversy, or abuse, as possible.").

apportioning representatives. Br. I at 45 (quoting 1 *Records of the Federal Convention of 1787* 602 (Max Farrand ed., 1911).[48] Though appellants are at pains to emphasize that they seek to defend only a statistical adjustment that is more accurate than a physical headcount, their understanding of the term "enumeration" contains no such limitation and thus it must be supposed that the Framers authorized future Congresses to revive the rough conjecture underlying the first apportionment, even though all agree that was never to be repeated.

Appellants make the specious argument that the apportionment population has *never* been based on an individualized "headcount" of people, but an "aggregate" count. Br. I at 47. But the census population has always consisted solely of individuals who are observed and counted by another individual. To be sure, the person doing the counting of the individuals included was not always a federal employee, but often was the parent or spouse living in the household where the individual lived. Br. I at 48. But the fact that the census population was "reckoned singly" by someone other than a federal employee, and then reported to the federal census workers in "aggregate" numbers, is obviously of no import. Br. I at 47-48. The apportionment population still consisted only of individual "heads" actually observed and counted. Noah was doing a "headcount" of his Ark's population even though he was counting "two by two," rather than "one by one."

Here, however, the apportionment population, for the first time in our Nation's history, consists of tens of millions of "people" whose homes or bodies have never been seen by anyone either in the Department or anyone reporting to the Department. These "people" are assumed to exist only because people with the same skin color (or some other

[48] Appellants maintain that the first apportionment was based on considerations of states' future population and wealth, as well as current population. Br. I at 45 n.26. However that may be, all agree that the actual enumeration standard was intended to eliminate any conjectural ratio, whether the conjecture related to population or wealth. This objective would not have been achieved if the term "enumeration" included conjectural ratios.

demographic characteristic the Department deems dispositive) were missed by the initial enumeration but ultimately found in follow-up procedures. The "missing" people remain wholly unidentified by anyone and there is no tangible evidence – as opposed to a statistical inference based on tangible evidence – that they do exist. In short, the fact that prior census populations included individuals identified by *hearsay evidence* neither suggests that these prior efforts were other than "headcounts" nor that a census population may include people not identified by tangible evidence of any kind.

Appellants apparently believe that because statistical estimates have recently reached a level of precision never envisioned by the Framers, this means that such statistical estimates are equivalent to counts if "shown" to be more "accurate." But the confidence one has in an estimate does not change the fact that it is an estimate, and is not a count. By analogy, congressional elections are based on a count of the ballots cast for a candidate. Obviously this process is often not 100% accurate because ballots are lost or tallied incorrectly. Nevertheless, the Court would never allow congressional election results to be altered pursuant to a sophisticated, statistical regression analysis which "accurately" estimates the number of missing ballots and the voting patterns of the missing voters, based on race, etc. The Constitution similarly does not tolerate deciding congressional *apportionment* on estimates that experts consider reliable, and for the same reason. Regardless of how honest that statistical computation is, the estimate (and corresponding adjustment) necessarily is based on assumptions not susceptible to empirical proof or disproof.[49] As such, they are inherently subject to manipulation and/or expert judgments that courts (or others)

[49] For example, the appellants' plan assumes that wealthy Park Avenue socialites are just as likely to be counted by the census as Arabs and Hasidic Jews in Buffalo because *all* are urban "whites and others." JA II 117. As Secretary Mosbacher stated: "The models used to infer populations across the nation depended heavily on assumptions, and the results changed in important ways when the assumptions changed." 56 Fed. Reg. 33,582, 33,585 (July 1991).

cannot reliably verify. By definition, then, a statistical adjustment cannot constitute the permanent, precise standard required by the Framers.

Barring the use of statistical estimates for apportioning the population plainly does not, as appellants suggest, constitute judicial usurpation of Congress' authority to determine the "manner" in which the actual enumeration is conducted. Br. I at 41. The Court, rather, would simply be determining whether appellant's plan *constitutes* an "actual Enumeration," an interpretive function the Court must perform for all language in the Constitution. While it is for Congress to determine the method of conducting the "actual Enumeration," it is for the Court to determine what an "actual Enumeration" is. Congress has the unfettered authority to make the myriad decisions on how to best conduct the headcount, and this methodology has significantly changed over the years. But Congress cannot do something *other than* an "actual Enumeration" and remain " 'consistent with the constitutional language . . . . ' " *Wisconsin*, 517 U.S. at 15 (quoting *Franklin*, 505 U.S. at 804).

CONCLUSION

The Court should affirm the judgment of the district court.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

MATTHEW GLAVIN, et al., Plaintiffs,	)	
v.	)	Civil Action No. 98-207-A
WILLIAM J. CLINTON, et al., Defendants.	)	

ORDER

(Filed Oct. 19, 1998)

This motion comes before the Court on the plaintiffs' motion to clarify that Plaintiffs' motion to amend Complaint and Plaintiffs' second motion to amend Complaint have been granted, and to clarify that Delaware County, Pennsylvania, Bucks County, Pennsylvania and DuPage County, Illinois are plaintiffs to this action. It appearing to the Court that the additional plaintiffs were included in oral argument at the time of the hearing on August 7, 1998, and whereas the plaintiffs' have moved for further clarification, it is hereby

ORDERED that Plaintiffs' motion to amend Complaint is GRANTED, and Plaintiffs' second motion to amend Complaint is GRANTED, and Delaware County, Pennsylvania, Bucks County Pennsylvania and DuPage County, Illinois are plaintiffs to this action.

Judges Widener and Jackson concur.

/s/ Claude M. Hilton
CHIEF JUDGE CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
October 19, 1998